ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of	)	
	)	
Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service	)	PR Docket No. 89-552 RM-8506
	)	
Implementation of Sections 3(n) and 332 of the Communications Act	)	GN Docket No. 93-252
	)	
Regulatory Treatment of Mobile Services	)	
	)	
Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 220-222 MHz	)	PP Docket No. 93-253

To: The Commission

REPLY COMMENTS OF SMR ADVISORY GROUP, L.C.

SMR Advisory Group, L.C. ("SMR Advisory"), by its counsel and pursuant to Section 1.415 of the Federal Communications Commission ("FCC" or "Commission") Rules and Regulations, hereby submits its reply comments on the Second Memorandum Opinion and Order and Third Notice of Rulemaking ("Third Notice")[1] in the captioned proceeding. More than thirty (30) parties submitted comments on the FCC's Third Notice. Although the commenters expressed differing views on certain of the proposed rules, there was little objection to much of the new regulatory scheme proposed by the FCC.

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[1] FCC 95-312, PR Docket No. 89-552, RM-8506, released August 28, 1995.

For example, most commenters either endorsed or did not object to the FCC's proposal to license Phase II authorizations in Economic Areas and Regional Areas pursuant to a competitive bidding procedure, and in particular, to the FCC's selection of a simultaneous multiple round auction procedure for these licenses.[2] Similarly, most commenters addressing the issue generally approved the contemplated bidding preferences for small businesses.[3] The majority of commenters also supported the FCC's elimination of use restrictions in the 220 MHz Service, including, for example, the current restrictions on paging and fixed services.[4]

Among the proposals discussed by the commenters, two items in particular prompted strong statements of support and opposition. Specifically, many of the commenters devoted substantial time to the following two issues:

- Whether the FCC should return the pending 33 nationwide non-commercial applications and license the spectrum in three 10-channel blocks pursuant to an auction procedure; and
- To what extent Phase II licensees should be required to protect incumbent Phase I licensees?

With respect to the first item, as indicated in its initial comments in this proceeding, SMR Advisory strongly supports the FCC's proposal to return these applications and to proceed

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[2] See, e.g., Comments of SMR Advisory Group, L.C. ("SMR Advisory Comments"), at pp. 18-21; Comments of the American Mobile Telecommunications Association ("AMTA"), at pp. 21-22; Comments of Comtech Communications, Inc. ("Comtech"), at pp. 15-18; Comments of US Mobilcomm, Inc. ("USA Mobilcom"), at p. 6.

[3] See, e.g., AMTA Comments, at p. 22; SMR Advisory Comments, at p. 20.

[4] See, e.g., Comments of Paging Networks, Inc. ("Pagenet"), at p. 13; Comments of Overall Wireless Communications Corp. ("OWCC").

to license the spectrum pursuant to a competitive bidding procedure. Regarding the issue of interference protection, SMR Advisory endorses the position of the American Mobile Telecommunications Association ("AMTA") that the 28 dBu contours of all Phase I Licensees should be protected, with signal parity between Phase I and Phase II licensees at the borders of their respective 28 dBu contours. SMR Advisory's reply comments on these issues are set out below.

I.

DISCUSSION

A. The Commission Clearly is Empowered to Return the 33 Pending Non-Commercial Nationwide Applications and to Auction the Nationwide Spectrum.

A number of commenters objected to the FCC's proposal to return the pending nationwide applications and to auction three nationwide licenses of 10-channel blocks each. Some commenters argued that the FCC lacks authority to auction spectrum initially allocated for non-commercial use and for which applications already are pending.[5] Commenters also argued that the policy objectives of Section 309(j) would not be served by the return of the pending non-commercial applications and the subsequent auctioning of

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[5] Thus, for example, MTEL Technologies, Inc. argued that while the Omnibus Budget Reconciliation Act of 1993 "provides the Commission with discretion to lottery applications prior to [July 26, 1993], nowhere does it grant the Commission discretion also to auction the licenses to which they relate." See Comments of MTEL Technologies, Inc. ("MTEL"), at p. 4. Similarly, AMTA noted that "Congress has not extended [auction] authority to include spectrum used for internal, non-commercial communications such as that proposed by the pending nationwide applicants." See AMTA Comments, at pp. 9-10.

the associated spectrum.[6] Other commenters urged that equitable considerations dictated retaining the 33 pending non-commercial nationwide applications, and licensing them by lottery.[7] And still other commenters maintained that the continued demand for non-commercial nationwide frequencies justified processing the pending non-commercial applications by lottery.[8] SMR Advisory submits that these arguments are not persuasive.

In considering the scope of the FCC's authority on this issue, most commenters focused erroneously on the Commission's power to auction "non-commercial" spectrum. In fact, however, the Commission is proposing first to return the pending non-commercial applications, then to redesignate the spectrum as "commercial spectrum," and only then to auction the three 10-channel nationwide blocks pursuant to a competitive bidding procedure. Accordingly, the issue is not whether the Commission is permitted to license spectrum which will be used primarily for non-commercial purposes, but rather whether the Commission is permitted to return pending applications when circumstances have changed dramatically from the initial filing dates, and then to auction spectrum which has been redesignated for uses which will be primarily commercial. When considered in this context, there can be no question as to the FCC's authority to auction three nationwide blocks of 10-channels each.

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[6] See, e.g., PNC Comments, at 11-14 (the selection of nationwide licensees by competitive bidding procedures would delay the provision of 220 MHz Service to the public). See also MTEL Comments, at 7-10.

[7] See, e.g., Comments of Columbia Cellular Corporation ("Columbia"); Comments of U.S. Central, Inc. ("US Central"); Comments of Securicor Radiocoms, LTD ("Securicor"), at p. 16.

[8] Comments of the Industrial Telecommunications Association ("ITA"), at pp. 4-8.

As for the first action proposed -- the return of the pending applications -- applicants for authorizations clearly lack the entitlement rights attributed to existing licensees. Nor does the application of new rules to pending applications constitute impermissible retroactive rulemaking.[9] Until action on an application is final, processing has not been completed, and rule changes applicable to that application are not retroactive.[10] Moreover, all applicants filing mutually exclusive applications accept the risk that they will not attain the applied-for license, whatever the licensing procedure.[11]

In the case at hand, the 33 pending non-commercial applications were filed more than four years ago. At the time, the stated purpose for maintaining a separate non-commercial set-aside was to encourage the development of the narrowband technology in the marketplace.[12] That objective no longer applies given the extensive deployment of 220

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[9] Chemical Waste Management, Inc. v. EPA, 869 F. 2d 1526, 1536 (D.C. Cir. 1989) ("It is often the case that a business will undertake a certain course of conduct based on current law, and will then find its expectations frustrated when the law changes. This has never been thought to constitute retroactive rulemaking.") It is well established that the Commission may apply new rules to pending applications. See, e.g., United States v. Storer Broadcasting Co., 351 U.S. 192 (1956); Hispanic Information and Telecommunications Network v. FCC, 865 F. 2d 1289 (D.C. Cir. 1989).

[10] See, e.g., Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, 9 FCC Rcd. 6513 (1994).

[11] Of the 33 applications pending, for example, only 4 applications would be granted, leaving the remaining 29 applicants with nothing to show for their investment..

[12] Amendment of Part 90 of the Commission's Rules to Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Services, PR Docket 89-552, 6 FCC Rcd 2356, 2361 (1991). See also Third Notice, at ¶ 34. ITA's argument that there is continued demand for a non-commercial set-aside, therefore, is not relevant to the questions of whether the pending applications should be processed by lottery, since such demand was not the basis for the non-commercial allocation in the first place.

MHz systems during the interim period. In light of the comprehensive restructuring of the rules governing the 220 MHz Service currently underway, the continued set-aside of substantial 220 MHz spectrum solely for non-commercial purposes simply is no longer justified. Accordingly, the FCC is not obligated to follow through on the processing of pending applications when the circumstances affecting those applications have changed so dramatically. The elimination of the non-commercial set-aside (resulting in the return of the pending non-commercial applications and the re-filing of applications for this spectrum based on the new rules), therefore, is entirely appropriate.

Following the return of the non-commercial applications and the elimination of the non-commercial set-aside for the nationwide frequencies, the auctionability of that spectrum is determined by applying the criteria set out in Section 309(j) of the Communications Act. Section 309(j) grants the Commission the authority to select from among mutually exclusive applications by auction, where the Commission determines that

- the principal use of the spectrum is reasonably likely to involve commercial use, and
- the auctions will promote (i) the development and rapid deployment of new technologies, (ii) economic opportunity and competition while ensuring that new and innovative technologies are widely available without excessive concentration of licenses, (iii) the recovery for the public of a portion of the value of the spectrum; and (iv) the efficient and intensive use of the spectrum.

47 U.S.C. § 309(j). In the Third Notice, the Commission undertook an analysis of the 220 MHz Service as a class of service to determine whether it satisfied the Section 309(j) criteria for auctionability, and concluded that such criteria would in fact be met.[13] None of the

[13] Third Notice, at ¶ 108.

commenters took serious issue with the Commission's conclusions in this regard. Like the auctioning of licenses in the Regional and Economic Areas, the auctioning of nationwide applications will result in the most expeditious provision of 220 MHz service to the public, while best ensuring the recovery for the public of the value of the spectrum and the most efficient use of the spectrum.

B. SMR Advisory Supports AMTA's Position that That the Commission Adopt a 28 dBu Signal Strenth Standard, with Phase II Licensees Not to Exceed 28 dBu at the Phase I Licensee's 28 dBu Contour.

The Third Notice requested comment on the extent to which Phase II Licensees should be required to protect the incumbent Phase I Licensees.[14] The Commission had proposed that Phase II Licensees ordinarily not be permitted to construct their stations less than 120 kilometers from Phase I co-channel systems; provided, however, that Phase II Licensees could operate at less than 120 kilometers from co-channel stations if they could demonstrate at least 10 dB protection to the 38 dBuV/m contour of the Phase I Licensee's station.[15]

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[14] Third Notice, at ¶ 99.

[15] This separation distance could be further decreased with the consent of the affected co-channel licensees. Third Notice, at ¶ 99.

Most of the commenters addressing this issue opposed the FCC's proposed interference protection standard as wholly inadequate.[16] In its opening comments, SMR Advisory reserved its position on this issue pending a review of the comments filed on this issue and further discussions with other members of the 220 Council of AMTA.[17] Since the filing of the opening comments, SMR Advisory has conducted a review of its managed 220 MHz systems and has concluded that the average coverage range demonstrated by these systems is approximately forty (40) miles. Based on the evidence from these systems, a review of the comments submitted by other industry participants detailing their own experiences in real world coverage, and consultations by and among the members of AMTA's 220 MHz Council, SMR Advisory endorses AMTA's position, as stated in its reply comments, that the Commission should adopt a 28 dBu signal strength standard, with Phase II licensees not to exceed 28 dBu at the Phase I licensee's 28 dBu contour.[18] This revised standard is necessary and appropriate because it more accurately reflects the real world coverage of 220 MHz operators.[19]

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[16] See, e.g., AMTA Comments at p. 19; Comments of Incom Communications Corporation ("Incomco"), at pp. 4-6; Comtech Comments, at pp. 13-15; Comments of Roamer One, Inc. ("Roamer One"), at pp. 6-8.

[17] SMR Advisory Comments, at p. 2, n.2.

[18] The current co-channel separation requirement of 120 kilometers should be retained, unless the parties have agreed to a lesser distance.

[19] There is ample precedent for the expanded protection urged here. The FCC has modified service area definitions based on real world data in other services. The rules governing cellular service, for example, initially defined the service area of a cellular operator by the combined 39 dBu contours of that operator. Following the accumulation of real world data on the actual coverage provided by cellular operators, however, the FCC agreed that actual cellular coverage was more accurately reflected by 32 dBu contours, and

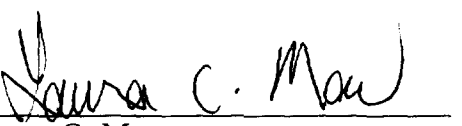
II.

CONCLUSION

For the reasons above, SMR Advisory urges the Commission to proceed to establish the proposed regulatory framework for the 220 MHz service, as modified by SMR Advisory's comments in this proceeding and its reply comments herein.

Respectfully submitted,

SMR ADVISORY GROUP, L.C.

By: 

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October 12, 1995

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modified its rules accordingly. See Cellular Service Second Report and Order, 7 FCC Rcd 2449, 2452-2453 (1992). Similarly, the FCC recently expanded the protected service areas available for wireless cable operators from 15 miles to 35 miles based on real world data supporting the increase in the protected service area. See Second Order on Reconsideration, Gen. Docket No. 90-54 & 80-113, 60 Fed. Reg. 36737 (July 18, 1995).